

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESAL PRICE LITIGATION

MDL No. 1456

Civil Action No. 01-12257-PBS

THIS DOCUMENT RELATES TO:

Judge Patti B. Saris

State of Montana v. Abbott Labs., Inc., et al.,
D. Mont. Cause No. CV-02-09-H-DWM

**DECLARATION OF KATHLEEN M. O’SULLIVAN
IN SUPPORT OF DEFENDANTS’ JOINT MOTION
FOR SUMMARY JUDGMENT**

I, Kathleen M. O'Sullivan duly declare as follows:

DEPOSITION TRANSCRIPTS

1. Attached to this declaration as Exhibit 1 is a true and correct copy of relevant excerpts from the February 15, 2006 deposition of Randal Bowsher, former Montana Medicaid Physician Program Officer.

2. Attached to this declaration as Exhibit 2 is a true and correct copy of relevant excerpts from the June 16, 2006 deposition of Denise Brunett, Montana Medicaid Program Officer for Physician Services.

3. Attached to this declaration as Exhibit 3 is a true and correct copy of relevant excerpts from the April 5, 2006 deposition of Margaret Bullock, former Administrator, Department of Public Health and Safety Division.

4. Attached to this declaration as Exhibit 4 is a true and correct copy of relevant excerpts from the October 19, 2005 deposition of Montana's 30(b)(6) designee Jeff

Buska, Senior Medicaid Policy Coordinator for Montana Department of Public Health and Human Services (“DPHHS”).

5. Attached to this declaration as Exhibit 5 is a true and correct copy of relevant excerpts from the December 14, 2005 deposition of Montana’s 30(b)(6) designee Jeff Buska.

6. Attached to this declaration as Exhibit 6 is a true and correct copy of relevant excerpts from the March 17, 2006 deposition of Mary Angela Collins, Supervisor, Managed Care Section, Montana DPHHS.

7. Attached to this declaration as Exhibit 7 is a true and correct copy of relevant excerpts from the April 12, 2006 deposition of Mary Dalton, Montana Medicaid Health Resources Division Administrator.

8. Attached to this declaration as Exhibit 8 is a true and correct copy of relevant excerpts from the April 11, 2006 deposition of Nancy Ellery, former Montana Medicaid Program Administrator.

9. Attached to this declaration as Exhibit 9 is a true and correct copy of relevant excerpts from the April 18, 2006 deposition of Charles L. Hunter, former Montana Medicaid Administrator Health Resources Division.

10. Attached to this declaration as Exhibit 10 is a true and correct copy of relevant excerpts from the April 10, 2006 deposition of Jeffrey E. Ireland, former Section Supervisor, Managed Care Montana DPPHS.

11. Attached to this declaration as Exhibit 11 is a true and correct copy of relevant excerpts from the March 17, 2006 deposition of Terry Krantz, former Supervisor, Health Maintenance Section Montana DPHHS.

12. Attached to this declaration as Exhibit 12 is a true and correct copy of relevant excerpts from the March 29, 2006 deposition of Shannon Marr, former Montana Medicaid Pharmacy Program Manager.

13. Attached to this declaration as Exhibit 13 is a true and correct copy of relevant excerpts from the December 15, 2005 deposition of Daniel Wade Peterson, Montana Medicaid Pharmacy Program Supervisor.

14. Attached to this declaration as Exhibit 14 is a true and correct copy of relevant excerpts from the February 22, 2006 deposition of Dorothy Poulsen, former Montana Medicaid Pharmacy Program Officer.

15. Attached to this declaration as Exhibit 15 is a true and correct copy of relevant excerpts from the April 20, 2006 deposition of Duane Preshinger, Montana Medicaid Acute Services Bureau Chief.

16. Attached to this declaration as Exhibit 16 is a true and correct copy of relevant excerpts from the March 8, 2006 deposition of James E. Smith, Director of the Montana Pharmacy Association.

17. Attached to this declaration as Exhibit 17 is a true and correct copy of relevant excerpts from the March 24, 2006 deposition of Timothy P. Stratton, former Professor of Pharmacy Administration, University of Montana.

18. Attached to this declaration as Exhibit 18 is a true and correct copy of relevant excerpts from the September 28, 2004 deposition of Tina Wong, deponent on behalf of Montana Blue Cross Blue Shield.

DOCUMENTS PRODUCED OR IDENTIFIED DURING DISCOVERY

19. Attached to this declaration as Exhibit 19 is a true and correct copy of MT005760, relating to the adoption of reimbursement rates for Montana Medicaid.

20. Attached to this declaration as Exhibit 20 is a true and correct copy of MT00001-00004, relating to the adoption of reimbursement rates for Montana Medicaid.

21. Attached to this declaration as Exhibit 21 is a true and correct copy of Exhibit 16 from the February 22, 2006 deposition of Dorothy Poulsen, relating to Montana's transmittal of its State Plan.

22. Attached to this declaration as Exhibit 22 is a true and correct copy of MT014542-014544, relating to Montana's transmittal of its State Plan.

23. Attached to this declaration as Exhibit 23 is a true and correct copy of MT00025-00029, relating to the 2002 amendment of Montana Medicaid's reimbursement rates.

24. Attached to this declaration as Exhibit 24 is a true and correct copy of MT005658-MT005659, relating to the 2002 amendment of Montana Medicaid's reimbursement rates.

25. Attached to this declaration as Exhibit 25 is a true and correct copy of MT011557 and MT034222, indicating the variety of reimbursement benchmarks actually used by Montana in its payment of claims.

26. Attached to this declaration as Exhibit 26 is a true and correct copy of MT008430-008431, a June 10, 1999 facsimile from Dorothy Poulsen relating to the variety of reimbursement benchmarks used by Montana in its payment of claims.

27. Attached to this declaration as Exhibit 27 is a true and correct copy of MT006626-006642, a December 6, 1999 report by Dorothy Poulsen titled "Montana Medicaid Prescription Drug Program."

28. Attached to this declaration as Exhibit 28 is a true and correct copy of MT076208-MT076240, a November 15, 2000 contract between Blue Cross Blue Shield of Montana and the State of Montana DPHHS Child Health Insurance Plan.

29. Attached to this declaration as Exhibit 29 is a true and correct copy of Exhibit 5 from the March 8, 2006 deposition of Jim Smith, relating to the small number of pharmacies in rural Montana.

30. Attached to this declaration as Exhibit 30 is a true and correct copy of MT017041-017064, a January 2001 presentation title “Montana Medicaid Prescription Drug Program.”

31. Attached to this declaration as Exhibit 31 is a true and correct copy of relevant excerpts from an October 4, 2004 letter from Montana Medicaid Deputy Director John Chappuis to Dr. Mark McClellan at CMS.

32. Attached to this declaration as Exhibit 32 is a true and correct copy of MT025491-025510, a January 2003 report prepared by the Montana Pharmacy Association titled “2002 Survey of Montana Community Pharmacies.”

33. Attached to this declaration as Exhibit 33 is a true and correct copy of Exhibit 2 from the February 22, 2006 deposition of Dorothy Poulsen, a July 1996 report by the Office of Inspector General (“OIG”) titled “Review of Pharmacy Acquisition Costs for Drugs Reimbursed Under the Medicaid Prescription Drug Program of the DPHHS.

34. Attached to this declaration as Exhibit 34 is a true and correct copy of Exhibit 14 from the October 19, 2005 deposition of Jeff Buska, a February 2002 report by the Office of Inspector General (“OIG”) titled “Review of Pharmacy Acquisition Costs for Drugs

Reimbursed Under the Medicaid Prescription Drug Program of the Montana Department of Public Health and Human Services.”

35. Attached to this declaration as Exhibit 35 is a true and correct copy of MT019208-019211, a March 19, 1996 letter from June Brown from the OIG, to Peter Blouke from Montana DPHHS.

36. Attached to this declaration as Exhibit 36 is a true and correct copy of MT019199-019205, an October 5, 1995 Memorandum authored by Terry Krantz, relating to OIG reports concerning pharmacy acquisition costs in Montana.

37. Attached to this declaration as Exhibit 37 is a true and correct copy of MT013790, a February 28, 2000 letter from George M. Reeb from the OIG to Dorothy Poulsen.

38. Attached to this declaration as Exhibit 38 is a true and correct copy of MT013731-013743, an August 2001 draft report from the OIG titled “Review of Pharmacy Acquisition Costs for Drugs Reimbursed Under the Medicaid Prescription Drug Program of the Montana Department of Public Health and Human Services.”

39. Attached to this declaration as Exhibit 39 is a true and correct copy of MT013728, a December 5, 2001 letter from Margaret Bullock to Gordon L. Sato, Regional Inspector for the Department of Health and Human Services division of the OIG.

40. Attached to this declaration as Exhibit 40 is a true and correct copy of a document produced by the State of Montana in the electronic files of John Chappuis, entitled “Montana Medicaid Values, Principles and Policy Goals.”

41. Attached to this declaration as Exhibit 41 is a true and correct copy of MT005418, a document containing handwritten notes from Dorothy Poulsen related to the pricing of pharmaceuticals.

42. Attached to this declaration as Exhibit 42 is a true and correct copy of MT028841-28843, a June 22, 2000 email from Cody Wiberg, Pharmacy Program Manager, Minnesota Department of Human Services, to an email list serve for National Medicaid Pharmacy Administrators.

43. Attached to this declaration as Exhibit 43 are true and correct copies of MT008600-8604; MT008580-008585; MT008551-008553; MT008413-008417; MT008281-008285; MT026192-26195, and; MT026171-026175, which are National Pharmaceutical Council surveys, reflecting Montana Medicaid's reimbursement methodology for the given period.

44. Attached to this declaration as Exhibit 44 is a true and correct copy of MT013606-13616, an April 5, 2002 report entitled "2002 Survey of Montana Pharmacies."

45. Attached to this declaration as Exhibit 45 is a true and correct copy of Exhibit 10 from the March 24, 2006 deposition of Timothy Stratton, which is a December 2002 report titled "Findings from the Montana Pharmacy Association 2002 Survey of Montana Community Pharmacies."

46. Attached to this declaration as Exhibit 46 is a true and correct copy of MT014566-014585, a January 2003 report titled "2002 Survey of Montana Community Pharmacies."

47. Attached to this declaration as Exhibit 47 are true and correct copies of MT033299; MT033303; MT033307; MT033337, which are notes reflecting responses to surveys of Montana pharmacies related to the their dispensing fees.

48. Attached to this declaration as Exhibit 48 are true and correct copies of relevant excerpts from Exhibits 19 and 20 from the August 22, 2006 deposition of Raymond

Hartman, which are an August 1993 Report prepared for HCFA titled “Assessment of Adequacy of Reimbursement Rates to Pharmacies and Its Impact on Access to Medication and Pharmacy Services by Medicaid Recipients” and a 2004 report prepared for CMS titled “Medicaid and Medicare Drug Pricing: Strategy to Determine Market Prices.”

49. Attached to this declaration as Exhibit 49 is a true and correct copy of MT013526-013530, relating to a 2002 change to the reimbursement rates for Montana Medicaid.

50. Attached to this declaration as Exhibit 50 is a true and correct copy of MT025554-MT025557, which is testimony from Montana Medicaid’s former Pharmacy Program Officer Shannon Marr related to the 2002 change to Montana Medicaid’s reimbursement methodology.

51. Attached to this declaration as Exhibit 51 is a true and correct copy of MT005648-005649, an October 3, 2002 letter from Gail Gray, Director of Montana DPHHS, to Mark Gilbert, Associate Regional Administrator of HCFA, regarding Montana’s change to the drug reimbursement methodology in its State Plan.

52. Attached to this declaration as Exhibit 52 is a true and correct copy of MT013531-013539, which is a summary of the notice and comment process relating to Montana Medicaid’s 2002 increase to its pharmacy dispensing fee.

53. Attached to this declaration as Exhibit 53 is a true and correct copy of MT00039-00043, which is a March 19, 2003 Notice of Public Hearing on Proposed Amendment related to a proposal, ultimately rejected by Montana Medicaid, to change reimbursement for generic drugs from AWP-15% to AWP-25%.

54. Attached to this declaration as Exhibit 54 is a true and correct copy of MT005768-005771, which is testimony from Dan Peterson, Montana Medicaid Pharmacy

Program Officer, related to the proposed and rejected change to Montana Medicaid's reimbursement methodology for generic drugs.

55. Attached to this declaration as Exhibit 55 is a true and correct copy of an August 19, 2005 email from John Chappuis to Alice Wiess, regarding the relationship between adequate reimbursement for pharmacies and maintaining access to drugs.

56. Attached to this declaration as Exhibit 56 are true and correct copies of MT038039; MT029673; MT038141, and MT076440-76448, reflecting communications between Defendants AstraZeneca Pharmaceuticals LP, TAP Pharmaceutical Products, Inc., and Bayer Corporation, and Montana Medicaid regarding those Defendants' Average Sales Prices ("ASP") data.

57. Attached to this declaration as Exhibit 57 are true and correct copies of MT015775-MT015776; MT005538-005539; MT075897-MT075898; MT075895-75896, and; MT075893-MT075894, which are true and copies of correspondence from the Montana Medicaid to HCFA, certifying that Montana Medicaid's reimbursement methodology complied with applicable HCFA regulations regarding the "aggregate limit" for drug reimbursement.

58. Attached to this declaration as Exhibit 58 is a true and correct copy of MT008315-MT008317, a November 6, 2000 facsimile from Dorothy Poulsen related to the sources of information available to Montana Medicaid regarding drug pricing.

59. Attached to this declaration as Exhibit 59 are true and correct copies of excerpts from the February 9, 2005 expert report of Dr. Ernst R. Berndt, the independent expert retained by the Court in the MDL case.

60. Attached to this declaration as Exhibit 60 is a true and correct copy of Exhibit 3 to the deposition of Geoffrey Kilgore, related to savings obtained by pharmaceutical benefit manager AdvancePCS for its participating plans.

61. Attached to this declaration as Exhibit 61 is a true and correct copy of MT014693-014727, an April 1997 OIG report titled “Medicaid Pharmacy – Actual Acquisition Cost of Prescription Drug Products for Brand Name Drugs.”

62. Attached to this declaration as Exhibit 62 are true and correct copies of MT011721, and MT003220-003221, the MA-5 and HFCA-1500 claims forms used by providers to request reimbursement from Montana Medicaid for drugs.

63. Attached to this declaration as Exhibit 63 is a true and correct copy of MT015582, a February 5, 2001 letter from Dorothy Poulsen to Jessica Rosewag of Covance Health Economics and Outcomes Services, Inc., regarding Montana Medicaid’s use of J-Codes for the billing of physician-administered drugs.

64. Attached to this declaration as Exhibit 64 is a true and correct copy of relevant excerpts from the report of Plaintiff’s damages expert Raymond S. Hartman.

65. Attached to this declaration as Exhibit 65 is a true and correct copy of MT005256, related to Montana Medicaid’s mandatory generic policy.

66. Attached to this declaration as Exhibit 66 is a true and correct copy of MT029085-029089, a March 8, 2005 letter from Robert E. Wynia, Montana DHPPS to U.S. Representative Joe L. Barton, which describes Montana Medicaid’s mandatory generic policy and also refers to the use of State MACs as a cost reduction measure.

67. Attached to this declaration as Exhibit 67 is a true and correct copy of MT016339-16341, a March 17, 1998 email to Nancy Ellery from Ray Hanley of Arkansas Medicaid regarding the distinction between AWP and WAC.

68. Attached to this declaration as Exhibit 68 is a true and correct copy of MT016295, a May 29, 1998 memo to the National Association of State Medicaid Directors regarding the use of WAC instead of AWP in Medicaid reimbursement methodologies.

69. Attached to this declaration as Exhibit 69 is a true and correct copy of MT023533, a January 24, 2003 memorandum from Dan Peterson to Barb Hoffman, regarding Montana Medicaid's proposed change to its reimbursement policy from AWP-15% to AWP-25% for generic drugs.

70. Attached to this declaration as Exhibit 70 is a true and correct copy of MT023930, a December 2002 Budget Reduction Proposal in Montana, indicating that a change to the reimbursement methodology for generic drugs for Montana Medicaid would have saved the State \$100,000 in fiscal year 2003.

71. Attached to this declaration as Exhibit 71 is a true and correct copy of MT016991, an August 1, 2000 email from Peggy King to Dorothy Poulsen regarding the use of State MACs in Montana Medicaid's claims database.

72. Attached to this declaration as Exhibit 72 is a true and correct copy of MT028948, a March, 2003 email from Peter Wolfram of Bungalow Drug to Jeff Buska at Montana Medicaid, opposing any reduction in Montana Medicaid's reimbursement for generic drugs.

73. Attached to this declaration as Exhibit 73 is a true and correct copy of MT025524, an April 2, 2003 letter from Ron Campbell of Drugmart United Pharmacy to

Montana Medicaid, opposing any reduction in Montana Medicaid's reimbursement for generic drugs.

**REGULATIONS, ADMINISTRATIVE MATERIALS AND GOVERNMENT
DOCUMENTS**

74. Attached to this declaration as Exhibit 74 are true and correct copies of Montana Administrative Regulations A.R.M. 37.86.1105 (2006) and A.R.M. 37.86.1101 (2006).

75. Attached to this declaration as Exhibit 75 is a true and correct copy of 39 Fed.Reg. 41,480-41,481 (November 27, 1974), *Reimbursement of Drug Cost – Medical Assistance Program*.

76. Attached to this declaration as Exhibit 76 is a true and correct copy of 40 Fed. Reg. 32,284, 32,293 (July 31, 1975), *Limitations on Payment or Reimbursement for Drugs*.

77. Attached to this declaration as Exhibit 77 is a true and correct copy of *Medicaid Action Transmittal*, No. 84-12, "Title XIX of the Social Security Act, Limitation on Payment or Reimbursement for Drugs" (Sept. 1984), *reprinted in Medicare and Medicaid Guide* (CCH) ¶ 34,157, at 10,193, 10,206 (1984).

78. Attached to this declaration as Exhibit 78 is a true and correct copy of HHS-OIG Report, *Medicare and Medicaid: Reimbursement for Drugs*, A-06-89-00037 (Oct. 3, 1989), *reprinted in Medicare and Medicaid Guide* (CCH) ¶ 38,215, at 21,163 (1989).

79. Attached to this declaration as Exhibit 79 are Minutes of the Montana Senate Public Health, Welfare & Safety Committee, Feb. 17, 1995 at 8, containing testimony from Montana Medicaid's Director at that time, Nancy Ellery, regarding the Montana Medicaid Fraud Statute.

80. Attached to this declaration as Exhibit 80 is a true and correct copy of the summary judgment order in the matter of *Osterman v. Sears*, No. BDV-99-522(c) (Cascade County Dist. Ct., Aug. 30, 2000).

DISCOVERY RESPONSES

81. Attached to this declaration as Exhibit 81 is a true and correct copy of relevant excerpts from the State of Montana's Objections and Responses to Defendant Bayer Corp.'s First Set of Interrogatories and Requests for Production to the State of Montana.

82. Attached to this declaration as Exhibit 82 is a true and correct copy of relevant excerpts from the State of Montana's Objections and Responses to Defendants' First Set of Requests for Admission.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct based on personal knowledge.

Executed this 8th day of February, 2007.

/s/ Kathleen M. O'Sullivan

Kathleen M. O'Sullivan

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2007, a true and accurate copy of the Declaration of Kathleen M. O'Sullivan in Support of Defendants' Joint Motion for Summary Judgment was served via the Lexis-Nexis Filing System:

DATED: [February 8, 2007](#).

/s/ Rebecca Gregory
Rebecca Gregory